IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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**No. 77-1051**

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BESSIE B. GIVHAN,

*Petitioner,*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT ET AL.,

*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR PETITIONER

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-26a)[1] is reported at 555 F.2d 1309. The district court's Memorandum Decision (Pet. App. B, pp. 27a-40a) is unpublished.

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[1] Citation is to the appendix to the petition for certiorari. The joint appendix is cited as "App." followed by the page reference. The record is cited as "R." followed by the page reference.

## JURISDICTION

The judgment of the court of appeals was entered on July 18, 1977. Pet. App. C, pp. 41a-42a. A timely petition for rehearing and suggestion for rehearing en banc was denied on October 27, 1977. Pet. App. D, pp. 43a-44a. A timely petition for writ of certiorari was filed on January 25, 1978, and was granted on April 3, 1978. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1970).

## QUESTION PRESENTED

Whether a teacher's statements criticizing practices in her school which she believes to be racially discriminatory are protected by the First Amendment where those statements are communicated to her principal rather than presented in a public forum.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment XIV:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes, § 1979, 42 U.S.C. § 1983 (1970):



> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## STATEMENT OF THE CASE

This case arises from the decision by school officials in a Mississippi school district, made during the process of school desegregation, refusing to reemploy a concededly competent black teacher, petitioner Bessie B. Givhan, because she urged her principal to modify practices in her school which she believed to be racially discriminatory. Pet. App. 9a, 35a-36a.[2] Petitioner intervened in a pending desegregation case against the school district, *Ayers* v. *Western Line Consolidated School Dist. et al.*, No. GC-66-1-S (N.D. Miss.). App. 14. Her complaint in intervention alleged, *inter alia*, that the decision to terminate her employment violated the First and Fourteenth Amendments to the Constitution and R.S. § 1979, 42 U.S.C. § 1983. The district court granted judgment for Mrs. Givhan. It found that "the primary reason for the school district's failure to renew Givhan's contract was her criticism of the policies and practices of the school district, especially the school to which she was assigned to teach . . . [and] that the school district's motivation in failing

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[2] Respondents are the Western Line Consolidated School District, Mississippi; its Superintendent, Harold N. Adams; its Board of Education; the members of its Board of Education, H. T. Cochran, W. T. Eifling, Chalmers Hobart, Wynn Starnes, Clyde Nichols, and Ivory Walker, Sr.; and James S. Leach, Principal of Glen Allan Attendance Center, a school operated by the respondent school district.

to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination." Pet. App. 35a-36a. The court of appeals reversed. It concluded that the district court's findings were not clearly erroneous but that neither a teacher nor a citizen has a First Amendment interest in making complaints to a principal. Pet. App. 8a-11a, 13a, 19a.

**The Evidence At Trial**

For six and one-half years, Mrs. Givhan taught English in a black school operated by respondent Western Line Consolidated School District. Pet. App. 2a, 4a. In the wake of this Court's decision in *Alexander* v. *Holmes County*, 396 U.S. 19 (1969), the district court ordered the school district to desegregate its faculty no later than February 1, 1970, and its student body no later than February 9, 1970. App. 4, 8-9. At that time Mrs. Givhan was assigned to an integrated school for the remainder of the 1969-70 school year. App. 121-33. Thereafter, she was assigned to another integrated school, Glen Allan Attendance Center, for the 1970-71 academic year. App. 140. Throughout the academic years 1969-70 and 1970-71, "[t]here were several incidents of student and teacher demonstrations and other unpleasant manifestations of general discontent and unrest among the black community as to the course of the desegregation" of the district. Pet. App. 35a. At the conclusion of the 1970-71 academic year, her new white principal, James Leach, recommended to the superintendent that Mrs. Givhan's contract not be renewed for the 1971-72 school year. The superintendent acquiesced in this recommendation, and thus Mrs. Givhan's employment terminated at the end of the 1970-71 school year. Pet. App. 4a, 8a.



The principal's avowed reasons for not recommending Mrs. Givhan were set forth in a letter to the superintendent dated May 1, 1971:

> "Mrs. Givhan is a competent teacher; however, on many occasions she has taken an insulting and hostile attitude toward me and other administrators. She hampers my job greatly by making petty and unreasonable demands. She is overly critical for a reasonable working relationship to exist between us. She also refused to give achievement tests to her homeroom students." App. 44.

In response to Mrs. Givhan's request for a statement of reasons, the superintendent said that contracts are renewed only for teachers who have been recommended by the principal and superintendent and that

> "Our records reflect that the reason why you were not recommended for re-hiring were: (1) a flat refusal to administer standardized national tests to the pupils in your charge;[3] (2) an announced intention not to co-operate with the administration of the Glen Allan Attendance Center; (3) and an antagonistic and hostile attitude to the administration of the Glen Allan Attendance Center demonstrated throughout the school year." App. 45.

At trial the principal was asked to name the "demands" he had referred to in his letter of May 1.[4] He testified

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[3] At trial Mrs. Givhan testified that she did indeed administer the standardized tests to her students and that she did not announce that she would refuse to give the tests. App. 143-46. Prior to administering the tests, Mrs. Givhan had stated that the testing program should have been conducted by the guidance counselor rather than the teachers. App. 144.

[4] These "demands" evidently were stated in writing as well as orally. A letter by the principal to the superintendent states that "I was handed a list of requests from Mrs. Givhan recently, and some of these were reasonable requests for supplies, etc., but some were unreasonable in my opinion." App. 29.

that Mrs. Givhan requested that black Neighborhood Youth Corp (NYC) workers be assigned to office work as well as to janitorial tasks. App. 68.[5] He believed the NYC workers were not qualified for office work. *Id.*

The only other "demand" identified by the principal was Mrs. Givhan's request that "we place black people to take up [lunch] tickets in the cafeteria." App. 68.[6] The principal acknowledged:

> "There were not so many demands. Most of the demands that came through were—she would have a list of them and I would refer them up to the Superintendent. It was mostly the arrogance and antagonistic and hostile relationship that existed that were the main things involved." App. 69.

In this connection, the principal testified that on one occasion Mrs. Givhan said "I received your little memorandum" and threw it on his desk. App. 68. Mrs. Givhan did not recall making such a statement. App. 117. In addition, Mrs. Givhan denied feeling hostile toward school personnel and testified that she believed she had a "good relationship" with the principal. App. 117, 118.

**The District Court's Findings and Conclusions**

The district court first discussed two alleged bases for the refusal to renew Mrs. Givhan's contract which were not relied upon in the letters of either the principal or

[5] Mrs. Givhan testified that, in order to integrate office personnel, she requested that NYC workers "be used not only to do janitorial services but also to do little office work, such as pass out absentee slips, you know, and jobs of that type." App. 116.

[6] Mrs. Givhan testified that she informed Mr. Leach "that whites were in all choice positions," including the principalship, the secretary, the head counselor, as well as cafeteria ticket takers. App. 116-17. She testified that "When [students] see all white faces in the administration, it wasn't good for the atmosphere of the learning for the children." App. 116.



superintendent (*supra*, p. 5), but with respect to which evidence was offered at trial. First, the court considered the defendants' charge that on one occasion "Givhan failed to cooperate with the school administration in a weapons shakedown." Pet. App. 34a. The court found that the shakedown incident neither "served, or should have served, as a reason for the decision not to re-hire Givhan for the 1971-72 school year." Pet. App. 34a. The district court pointed out that the incident occurred in an earlier school year at a different school headed by a different principal, and Mrs. Givhan was recommended for contract renewal after the incident occurred.[7] Second, the court considered the claim, first made at trial, that Mrs. Givhan graded her students' papers in a racially discriminatory manner. The district court found the testimony offered in support of this charge "insufficient and inconclusive."[8] Pet. App. 34a.

Addressing the reasons for nonrenewal actually assigned in the letters of the principal and the superintendent, the court found that the testimony relating to the alleged refusal to administer a test was in "sharp conflict." Pet. App. 35a. Finally, turning to the "primary reason for the school district's failure to renew Givhan's contract," the court stated:

> "In [principal] Leach's words, Givhan was not rehired because she was constantly 'making petty and unreasonable demands.' The court finds that Givhan's 'demands' were not constant; Leach being able to testify specifically as to but two occasions. The court finds that those of Givhan's 'demands' as were specifically brought to the court's attention were neither 'petty' nor 'unreasonable', insomuch as all the com-

[7] The evidence shows that the superintendent was advised of the shakedown incident at the time it occurred. See Defendants' Exhibit 11 which is a memorandum dated March 17, 1970.

[8] The testimony appears at App. 126-35, 153, 154-55.

plaints in question involved employment policies and practices at Glen Allan school which Givhan conceived to be racially discriminatory in purpose or effect." Pet. App. 35a.

". . . [W]hen the school district's decision to terminate Givhan's employment is placed into a setting contemporaneous with its conception and execution, it becomes clear to the court that the school district's motivation in failing to renew Givhan's contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination." Pet. App. 35a-36a.

Relying on *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the district court concluded that the termination of Mrs. Givhan's employment violated rights secured by the First Amendment, entered judgment for plaintiff Givhan, and granted her backpay, reinstatement and attorneys' fees. Pet. App. 35a-36a; R. 509-11.

**The Court of Appeals' Decision**

The court of appeals concluded that the district court's finding that Leach and the board were motivated primarily by Givhan's "demands" in refusing to rehire her, was not clearly erroneous. Pet. App. 11a. The court of appeals noted that the district court (which had rendered judgment in this case prior to this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)), had not made an express finding as to whether the same decision would have been made without regard to the "demands." Pet. App. 11a. The court of appeals concluded, however, that

"on this record the appellants do not, and seriously cannot, argue that the same decision would have been made without regard to the 'demands.' Appellants



seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving that the same decision would have been made." Pet. App. 11a.

Nevertheless, the court of appeals reversed the judgment of the district court on the ground that Mrs. Givhan's expressions were not constitutionally protected. Pet. App. 19a. The court found a "strong implication" in this Court's decisions in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); and *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), that "private expression by a public employee is not constitutionally protected." Pet. App. 16a. Additionally, it found that *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), adds "support" to the "dichotomy," for purposes of constitutional protection, between public and private speech by public employees. Pet. App. 16a-18a.

The court of appeals also reasoned that "no one has a right to press even 'good' ideas on an unwilling recipient," citing *Rowan* v. *United States Post Office Department*, 397 U.S. 728, 737 (1970), and Justice Douglas' concurring opinion in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 305, 307 (1974). Pet. App. 18a. While recognizing that "*Rowan* is arguably distinguishable because of the citizen's compelling interest in privacy within his or her own residence," the court stated that "[t]he rationale of *Rowan*, however, is not limited to the home. It applies whenever 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure,'" citing *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 & n. 5 (1975). Pet. App. 18a n.16. The court of appeals felt that this principle was applicable to this case, stating:

> "While an intrusion on privacy in the home may be of greater significance than an intrusion on privacy in the workplace, one's 'degree of captivity' in the workplace may be much greater. In the normal course of his job, principal Leach could hardly avoid exposure to teacher Givhan and her demands, requests, and complaints. Indeed, as a practical matter Leach was a very captive audience for Givhan as long as they both worked in the same school." Pet. App. 18a n.16.

The court of appeals, however, recognized that its rationale was not confined to public employees who might otherwise hold their superiors "captive." Rather, the court expressly declared that

> "[n]either a teacher *nor a citizen* has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision." Pet. App. 19a (emphasis added).

While recognizing that "[m]any, if not most people would consider Givhan's expressions laudable," the court of appeals was concerned that "[i]f we held Givhan's expressions constitutionally protected, we would in effect force school principals to be ombudsmen, for damnable as well as laudable expressions." Pet. App. 19a-20a.

The court of appeals acknowledged that this case "could be" one of those "hard cases [that] make bad law" (Pet. App. 19a); and one member of the court, Roney, J., specially concurred because there are "probably many occasions when First Amendment constitutional protection will reach private expression by a public employee, but I agree that the district court erred in casting this case in the First Amendment terms." Pet. App. 26a.



## ARGUMENT

### I. MRS. GIVHAN'S CRITICISM OF SCHOOL POLICY DID NOT LOSE ITS STATUS AS PROTECTED SPEECH MERELY BECAUSE SHE DID NOT PUBLICIZE HER VIEWS.

Under the decision of the court of appeals, the First Amendment does not protect a public employee's suggestions or criticisms concerning the policies of his or her government agency—regardless of the importance of the issue or the merit of the suggestion—if the employee privately expresses those views to a superior rather than presenting them in a public forum. This ruling unwarrantedly excises from the scope of the First Amendment a substantial and significant form of speech that is of potentially great value in contributing to enlightened decision-making by public officials.

The categories of speech which are per se unprotected by the First Amendment are few. Freedom of speech has been the rule, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952); the exceptions have been limited to "well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942); *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (1952). Thus, obscenity, fighting words, and malicious defamation have been denied constitutional protection on the theory that these types of speech "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky, supra*, 315 U.S. at 572.

Private utterances do not fall within the rare categories of expression excepted from First Amendment protection. Only recently, this Court ruled that even a law-

yer's "in-person solicitation" of employment is "speech" and is entitled to "some constitutional protection" notwithstanding the commercial nature of such speech. *Ohralik* v. *Ohio State Bar Association*, 46 U.S.L.W. 4511, 4514 (1978).

Nor is speech excepted from First Amendment protection because it is directed personally to a public official rather than voiced in a public forum. To the contrary, this Court has held that the First Amendment protected the nonprovocative objections voiced by an individual to a police officer who was then detaining him. *Norwell* v. *Cincinnati*, 414 U.S. 14 (1973). See also *Lewis* v. *New Orleans*, 415 U.S. 130 (1974).

The court of appeals, nevertheless, concluded that a public employee's "private expression" to his superior "is not constitutionally protected." Pet. App. 16a. To the extent the court of appeals rested its conclusion on what it termed a "strong implication" in this Court's decisions in *Pickering*, *Sindermann*, *Doyle*, and *City of Madison School District* that private expression by a public employee is not protected, the court's conclusion was unwarranted. Each case dealt only with the protection that the First Amendment affords to a teacher's public criticism of school policies, and this Court thus had no occasion to consider whether private speech by a teacher was protected. In the only case in which the Court has explicitly mentioned private speech by teachers, it said "every public employee is largely free to express his views, in public *or private*, orally or in writing." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 230 (1977) (emphasis added).

The court of appeals also withheld protection from a public employee's "private expression" to his superior for fear that such protection would create a right of access to public officials such as principal Leach. The court said that "[n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school Board decision." Pet. App. 19a.



This reasoning rests on an erroneous premise. A holding that the private expression of views to a public official implicates a First Amendment interest need not imply a constitutional right to an audience with that official.[9] *Cf. Pell* v. *Procunier*, 417 U.S. 817, 834 (1974); *Houchins* v. *KQED, Inc.*, No. 76-1310, slip op. at 10 (U.S. June 26, 1978). Whether and in what circumstances school officials can deny teachers access to their principals for private speech is not the issue presented by this case. This Court is confronted with a simpler issue—whether in the absence of regulations or directives governing access to her principal, a teacher accorded such access could be punished by school authorities for speaking to him on matters of school policy.

A citizen's criticism directed privately to a public official concerning an issue of public policy within that official's purview lies at the core of the values protected by the First Amendment. In the House debates on that

[9] By the same token, a holding that the private expression of views to a public official implicates a First Amendment interest need not imply that public employees have a right to abuse whatever natural access they may have to their superiors as a result of the working relationship. *Pickering* makes clear that an employee's speech right is not absolute and that the school district's interest in efficient operation of the schools must be weighed against the free speech interest of a teacher. 391 U.S. at 568. Additionally, this Court has held that speech may be limited by reasonable time, place and manner regulations. *Grayned* v. *City of Rockford*, 408 U.S. 104, 115-17 (1972); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 98 (1972). Thus, the court of appeals' concern that a principal may become a "captive audience" for a teacher under his supervision does not warrant its sweeping rule that the Constitution affords no protection at all to private expression by public employees to their superiors.

Amendment, Thomas Tucker of South Carolina moved to add language that would expressly secure the people's right "to instruct their representatives." James Madison, who drafted the First Amendment, opposed the motion, saying:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, *may privately advise them,* or declare their sentiments by petition to the whole body; in all these ways they may communicate their will." 1 Annals of Cong. 766 (Gales & Seaton eds. 1789) (emphasis added).

Indeed, when speech is closely tied to the governmental process, it merits the highest standard of protection afforded under the First Amendment. Just last term, this Court ruled that when "a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling.'" *First National Bank of Boston* v. *Bellotti*, 46 U.S.L.W. 4371, 4377 (1978), quoting *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960).[10]

*Bellotti* involved speech that was directed to the public in connection with a referendum and was therefore "intimately related to the process of governing" in the sense of self-governance. But in today's complex society, self-

[10] Although this case involves punishment for speech rather than a direct prohibition on speech, as was the case in *Bellotti*, this Court has made it clear that

> "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser* v. *Randall*, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).



governance constitutes only a fraction of the "process of governing." Another major component of the process is decisionmaking by elected and appointed officials charged with executing the will of the electorate embodied in legislation. Today the "marketplace of ideas" includes the channels by which information is communicated to these officials as well as directly to the people.[11] Thus, this Court has recognized that there is a First Amendment interest in promoting enlightened decisionmaking by those officials as well as by the public. In holding that a teacher's speech at a public school board meeting was protected, this Court observed that "restraining teachers' expressions *to the board* on matters involving the operation of the schools would seriously impair the board's ability to govern the district." *Madison School District* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 177 (1976) (emphasis added).

Quiet dialogue with public officials may often serve the end of enlightened decisionmaking by those officials as well as or better than public expression. Neither a public employee nor any other citizen can be assured that even a meritorious suggestion will be aired by the media. He may have to compete for space or broadcast time with issues and events of a more sensational nature. Even where he has access to the media, he may choose to express his views quietly to a public official in recognition that publicity does not necessarily make one's views more cogent, a public official more responsive to meritorious

[11] See Emerson, *The System of Freedom of Expression*, 570-71 (1970):

> "There remains room within the governmental bureaucracy for the operation, at least on a limited scale, of the system of free expression. Not only do the fundamental objectives of the First Amendment require this, but the vitality and ultimate effectiveness of the government service depend upon it. Except where the necessities of the employment relation demand otherwise, freedom of expression within the bureaucracy should be encouraged and protected."

criticism, or a policy more amenable to change. Where he anticipates that public exposure of his concern would needlessly embarrass public officials or other citizens or stiffen opposition to suggested reforms, the wiser and more effective course may be to present those concerns privately. Where, as here, a school district is in a period of racial conflict accompanying desegregation, a citizen may, as Mrs. Givhan did, reasonably decide to take her criticism of school policy to the principal rather than to a public forum.

Where a public employee is involved, he may reasonably conclude that maintenance of a mature, professional relationship with a superior requires the employee, at least initially, to treat directly with his superior on issues affecting the operation of his agency rather than to use the media as an intermediary. Additionally, he may choose internal communication out of a sense of loyalty, fair play, personal reticence or fear of reprisal.[12]

A rule denying constitutional protection to communications by a public employee to his superior would thus tend to deprive the employer of useful information and suggestions concerning agency policy and in turn to deprive the public of fully informed decisionmaking by the responsible public officials. As this Court has recognized, "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" on matters of school policy. *Pickering, supra*, 391 U.S. at 572. Faced with the choice of publicly criticizing the policies of his

[12] See "The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption," prepared for the Senate Committee on Governmental Affairs, 95th Cong., 2d Sess., p. 22 (Feb. 1978), which explains:

> "The decision to go outside . . . dramatically increases the employee's vulnerability to harassment and reprisals. Although it may appear that very little protection is afforded the employee who voices disagreement internally, even less is provided when outside contact is utilized."



superiors or remaining silent, a teacher or other public employee may well choose silence.

To expose public employees to punishment for internal communications would be detrimental to the public's interest in ensuring that inadequacies in public service be brought to the attention of responsible officials. So important is this public interest that "The Whistleblowers, A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption," prepared for the Senate Committee on Governmental Affairs, states that "[i]t is the *duty* of all federal employees to make known examples of governmental waste, misfeasance, or malfeasance to which they have been exposed during the course of their employment," and that "[t]he first step in a federal employee's attempt to eliminate governmental waste, misfeasance or malfeasance, should be to bring the problem to the attention of those officials most able to resolve it—the policy makers within the agency." *Id.* at 10-11 (emphasis added). The Report goes on to emphasize that "Agency heads who are made aware of a problem can be held accountable for its resolution." *Id.* at 11. This pinpointing of responsibility will contribute to the enlightenment of the citizenry should the employee find it necessary to make his views public.

The Fifth Circuit's blanket rule denying protection to all private expression directed to public officials is also objectionable because it would afford those officials abundant opportunity to condemn ideas and punish public employees and citizens capriciously. Under that ruling, the First Amendment would not prevent a municipal government from revoking a citizen's library privileges or trash collection services because he complained to an official reasonably perceived by the citizen to be the appropriate recipient of his complaint. Similarly, a citizen who chanced to sit next to the Secretary of HEW on a plane could put his Social Security benefits in jeopardy

by making suggestions for improving the administration of the department.

In the case at bar, the employee's statements to her principal occurred when the school district, after having resisted desegregation for many years, was converting to a unitary system. Mrs. Givhan, a black teacher, recommended to her white principal that black persons should be included in "choice" positions in the school. App. 116-17. No school policy or rule forbade teachers from discussing educational or other policy with their principals,[13] and there is no indication that principal Leach ever warned Mrs. Givhan not to discuss such matters. Mrs. Givhan's comments were neither intrinsically provocative nor harmful. As the Fifth Circuit observed, "[m]any, if not most people would consider Givhan's expressions laudable." Pet. App. 19a. To permit school officials to terminate a teacher's employment under these circumstances is to vest in those officials the discretion to punish speech according to the race of the speaker and the content of the speech. The Fifth Circuit's ruling contains the "distinct potential . . . for permitting discretionary enforcement against unpopular causes," *In re Primus*, 46 U.S.

[13] To the extent that school policy dealt with such communications, it appears to have encouraged dialogue between teachers and principals. Bessie Givhan testified that she understood that in making complaints she was to go through the chain of command, meaning that she was to take such matters up with the principal. App. 147. One of the District's teacher evaluation instruments stated that a teacher's knowledge, acceptance, and execution of school policy would be evidenced by conduct such as

> "Faithful and willing support of policies and program even to point of recommending change (loyalty)
>
> * * * *
>
> "Contributes to decision making when opportunity is provided and to implementation of decisions and policies made." R. 302.

The instrument also set store on a teacher's "Moral Courage (intellectual honesty, willing to stand up and be counted)," and on a teacher's sensitivity "to the needs for self and school evaluation and improvement. . . ." R. 303-04.



L.W. 4519, 4625 (1978), and for permitting such officials to "prescribe what shall be orthodox." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943); *Police Dept. of the City of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In sum, the Fifth Circuit's rule is inconsistent with sound government and the values and purposes of the First Amendment. The fact that Mrs. Givhan did not press her free speech right to the fullest extent should not be used to deny her speech any protection at all.[14]

## II. THE *PICKERING* BALANCE REQUIRES AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT.

As we have shown, Mrs. Givhan's criticism of school policy did not fall within a category of expression outside the scope of the First Amendment. Accordingly, the balancing test set forth in *Pickering* must be applied.[15] In our view, the record makes clear that under *Pickering*'s balancing test, the judgment of the district court must be affirmed.

There is no evidence credited by the district court satisfying the school district's burden of showing that Mrs. Givhan's expressions "either impeded [her] proper

[14] While each of the lower courts confined its analysis of the case to the speech clause, Mrs. Givhan's written and oral communications to her superior (see note 4, *supra*) also implicated the "petition" clause of the First Amendment. See *Jannetta* v. *Cole*, 493 F.2d 1334, 1337 n. 5 (4th Cir. 1974); *Swaaley* v. *United States*, 376 F.2d 857, 863 (Ct. Cl. 1967); *Burkett* v. *United States*, 402 F.2d 1002, 1003-04, 1007-08 (Ct. Cl. 1968); *Jackson* v. *United States*, 428 F.2d 844, 848 (Ct. Cl. 1970). *Cf. California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

[15] In *Pickering*, the Court said:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" 391 U.S. at 568.

performance of [her] daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Pickering, supra*, 391 U.S. at 572-73. See *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 508-09 (1969).[16] The district court expressly considered the school district's claims that Mrs. Givhan's so-called "demands" were "petty," "unreasonable," and "constant," and rejected each of them. Pet. App. 35a. Here, as in *Mt. Healthy* v. *Doyle*, there is no suggestion by the school district that the teacher "violated any established policy," or that the reaction of the school officials to the teacher's communication "was anything more than an *ad hoc* response" to the teacher's expression. 429 U.S. at 284. Indeed, there is no evidence showing that Mr. Leach was concerned enough to have warned Mrs. Givhan against criticism of school policy or that he took measures to disengage himself from conversation with her. In sum, the school district failed to show that its interest in the efficient operation of the school had been impaired by Mrs. Givhan's expression.

Even had the requisite impairment been shown, *Pickering* would require weighing that impairment against the interests of Mrs. Givhan and the public in her speech. See Note, "The Nonpartisan Freedom of Expression of Public Employees," 76 Mich. L. Rev. 365, 381-82 (1977). Here, those interests were of the highest order.

First, Mrs. Givhan's speech was "intimately related to the process of governing" the school district. *First National Bank of Boston* v. *Bellotti, supra*, 46 U.S.L.W. at 4377. Second, to her credit, she framed her criticism to avoid public embarrassment to her principal and inflammation of racial tensions existing in the community as a result of the court-ordered desegregation. Third, as a teacher with substantial experience teaching black children, and whose experience included teaching in segregated and desegregated schools, Mrs. Givhan was among those members of the community who were most likely to have an informed opinion concerning the harm to black children from confining blacks exclusively to menial jobs within the schools and restricting choice positions to whites. *Cf. Pickering, supra*, 391 U.S. at 572. Finally, in discussing such matters with her principal, she was seeking to protect the civil rights and advance the educational interests of the children at her school. *Rogers* v. *Paul*, 382 U.S. 198, 200 (1965). The Ninth Circuit in *Bernasconi* v. *Tempe Elementary School Dist. No. 3*, 548 F.2d 857 (1977), placed heavy, if not decisive weight, on this factor. There a school teacher and counselor was sanctioned because she opposed classifying Mexican-American students as mentally retarded on the basis of English language tests. In striking the *Pickering* balance for the teacher, the district court considered "the nature of the problem to which the plaintiff's communications addressed themselves" to be "[a]n important factor." *Id.* at 862. The court of appeals affirmed, saying

> "the School District's interest in being free from general criticism cannot outweigh the right of a sincere, educational counselor to speak out against a policy she believes to be both harmful and unlawful." *Id.*

In sum, on the evidence credited by the district court, the *Pickering* balance can only be struck in Mrs. Givhan's favor.

[16] Relying on *Tinker*, many courts have concluded that speech-based discipline of a teacher cannot stand unless the expression "materially and substantially" disrupts the educational process. *E.g., Smith* v. *Losee*, 485 F.2d 334, 339 (10th Cir. 1973) (en banc); *Mabey* v. *Reagan*, 537 F.2d 1036, 1047-50 (9th Cir. 1976); *Fluker* v. *Alabama State Board of Education*, 441 F.2d 201, 206 (5th Cir. 1971); *Los Angeles Teachers Union* v. *Los Angeles City Board of Education*, 71 Cal. 2d 551, 563, 455 P.2d 827, 835, 78 Cal. Rptr. 723, 731 (1969). The "material and substantial disruption" test has also been applied in cases involving other public employees. Note, "The Nonpartisan Freedom of Expression of Public Employees," 76 Mich. L. Rev. 365, 380-81 & nn. 66-67 (1977).

## CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and order that the judgment of the district court be affirmed.

Respectfully submitted,

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